LIBRARY
SUPREME COURT, U. S.
No. 73-1307

FILED
MAY 3 19
MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

ISRAEL ESPARZA RANGEL AND
DAVID ESPARZA RANGEL, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1307

ISRAEL ESPARZA RANGEL AND
DAVID ESPARZA RANGEL, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that a telephone conversation between petitioner Israel Rangel and an informant, which a government agent tape-recorded with the informant's permission, was erroneously received in evidence because the government failed to establish that the informant's consent was voluntary.

Following a jury trial in the United States District Court for the Southern District of Texas, both petitioners were convicted of distributing marihuana, in violation of 21 U.S.C. 841(a)(1), and petitioner Israel Rangel was in addition convicted of importing the drug, in violation of 21 U.S.C. 952(a) and 960(a)(1). Petitioners were each sentenced to four years' imprisonment and to special

parole terms of four years (A. 1-4).[1] The court of appeals affirmed (Pet. App. 11-16).

Petitioners' only contention is that a telephone conversation between petitioner Israel Rangel and Charles Murray (a co-defendant who was a fugitive at the time of trial), in which Rangel made statements warranting the inference that he had participated in the marihuana transactions (see Pet. 4-5), and which a Customs agent tape-recorded with Murray's permission, was erroneously received in evidence.[2] It is claimed that the government failed to show adequately that Murray consented to interception of the call.[3] Murray placed the call from the Customs office shortly following his arrest. The evidence on the voluntariness issue showed that Murray had been given the *Miranda* warnings prior to the placing of the call; that the agent, after displaying the taping equipment to Murray, asked him if he had his permission to record the call; and that Murray answered "Yes" (A. 42-46). Although counsel for petitioners had full opportunity to cross-examine the agent as to any other attendant circumstances, counsel made no pertinent additional inquiries (A. 46-48).

There is no merit to petitioners' claim that the government failed to present a detailed enough description of

---

[1]"A." refers to the appendix to petitioners' brief in the court of appeals, a copy of which is being lodged herewith.

[2]The court of appeals correctly noted that this objection is not available to petitioner David Rangel, since the conversation did not implicate him; the jury was instructed that it was admissible only against petitioner Israel Rangel (Pet. App. 13-14).

[3]18 U.S.C. 2511(2)(c) provides that it shall not be unlawful for a person acting under color of law to intercept a wire communication where one of the parties to the communication has given prior consent to the interception. Cf. *Rathbun* v. *United States*, 355 U.S. 107; and see *United States* v. *White*, 401 U.S. 745.

the events preceding the call to warrant a finding that Murray voluntarily consented to its recordation (Pet. 8-9). The trial court was amply warranted in concluding from the government's substantial *prima facie* showing, which the defense made no effort to counter, that Murray freely consented to the interception.[4] The court's inference was particularly justified in light of the undisputed fact that the record is devoid of any evidence suggesting that any improper pressure was exerted to induce consent. It is reasonable to assume that Murray was motivated to cooperate with the agent in the manner he did by the hope that, as a consequence, he would be dealt with more leniently. It is well established, however, that an informant's consent to the government's monitoring of a phone conversation to which he is a party is not vitiated by the fact that it may be motivated by a hope, or even a promise, of leniency. *United States* v. *Silva*, 449 F. 2d 145 (C.A. 1), certiorari denied, 405 U.S. 918; *United States* v. *Jones*, 433 F. 2d 1176, 1180-1181 (C.A. D.C.), certiorari denied, 402 U.S. 950; *Baker* v. *United States*, 430 F. 2d 499, 503 (C.A. D.C.), certiorari denied, 400 U.S. 965; *Good* v. *United States*, 378 F. 2d 934, 936 (C.A. 9); *McClure* v. *United States*, 332 F. 2d 19, 22 (C.A. 9), certiorari denied, 380 U.S. 945.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

---

[4]Indeed, as the court of appeals noted, petitioners' counsel "strenuously objected whenever the Government attempted to elicit testimony concerning the conversation between Murray and the agent on the question of consent" (Pet. App. 13). See A. 15-20, 43-46.